IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 77-329

ROBERT H. POLK - - - - - Petitioner

versus

THE UNITED STATES OF AMERICA - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ROBERT H. POLK - - - - - *Petitioner*

v.

THE UNITED STATES OF AMERICA - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Robert H. Polk, prays that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction in the United States District Court for the Middle District of Tennessee, Nashville Division.

OPINIONS BELOW

The United States District Court for the Middle District of Tennessee rendered no opinion and made no findings of fact or conclusions of law in rendering its verdict (a jury having been waived) of guilt, but there appear in the appendix the said Court's memorandum opinion refusing to stay execution of the judg-

ment pending appeal (*infra,* p. 25) and opinions or orders of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction with modification (*infra,* p. 21), *United States* v. *Polk,* 556 F. 2d 803 (1977), denying the petition for rehearing (*infra,* p. 23), and staying its mandate pending petition for *certiorari* (*infra,* p. 24).

JURISDICTION

(i) A judgment for the United States Court of Appeals for the Sixth Circuit affirming petitioner's conviction was entered May 26, 1977.

(ii) The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing was entered August 1, 1977, and that Court's order staying its mandate for a period of thirty days and conditionally thereafter until this Court should finally dispose of the case was entered August 11, 1977.

(iii) This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether dismissal of the indictment was mandated because of a 26-month unexplained delay in returning the indictment for bankruptcy fraud from the time when it was learned in bankruptcy proceedings that there had been a transfer of real property in violation of the Bankruptcy Act, by virtue of (i) the requirement of 18 U.S.C. § 3057(b) that such matters

should be presented to a grand jury "*without delay,*" (ii) the manifest prejudice to the defendant from the delay, and (iii) this Court's enunciation of factors that control decision of the reasonableness of post-indictment delay.

2. Whether the combination of pre-indictment delay followed by post-indictment rush in excess of the requirements of the Speedy Trial Act, 18 U.S.C. §§ 3161, *et seq.,* deprived the defendant of a fair trial with effective representation by counsel having adequate opportunity for investigation and preparation necessary for proper presentation of all defenses available to the defendant.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, Constitution of the United States:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

Title 18, United States Code, Section 152:

* * *

> "Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;
>
> * * *
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C. § 3057 concerning bankruptcy investigations and indictments, and pertinent parts of the Speedy Trial Act, 18 U.S.C. §§ 3161, *et seq.*, appear in the Appendix.

STATEMENT OF CASE

The federal jurisdiction of the court of first instance was based upon an indictment charging a bankruptcy offense, within that court's exclusive original jurisdiction under Article III of the Constitution and under 18 U.S.C. § 3231.

The defendant is a lawyer over 70 years of age who was indicted for causing a client to transfer and conceal real property (by transferring it from the client's individual name into the joint names of the client and his wife) in contemplation of bankruptcy. The fundamental factual dispute upon which petitioner's conviction was based was a dispute between petitioner and his former client, a poor black laborer of limited education and earnings:

The client insisted that he consulted petitioner about a bankruptcy proceeding, petitioner advised him to get married and convert his real property ownership into a tenancy by the entireties so that it would not be sold in bankruptcy proceedings, and that he followed petitioner's advice. Petitioner insisted that his client had come to him simply to have his single ownership converted into joint ownership, had returned within three weeks to file bankruptcy proceedings and that in preparing the bankruptcy petition he forgot the

transfer due to the natural forgetfulness of old age and the pressure of handling a large amount of small matters in his law practice. However, in actually filling out the bankruptcy form, Petitioner's secretary had remembered the deed, and had noted its book and page number on the bankruptcy petition, though the wording was such that it had the capacity to lead a reader to believe that the client's present wife Lillian Patten was a grantee in the original 1971 deed to the property instead of in a subsequent deed executed just before bankruptcy.

The fact of the recent execution of this deed was brought out in the bankruptcy court hearing, with the result that the property was sold and all creditors who filed claims were paid in full.

Petitioner waived trial by jury, and although he questioned on appeal the sufficiency of the evidence, this was not, as stated by the learned Court of Appeals, "the primary thrust" of those questions he raised which would require reversal.[1] Instead, his principal contentions going to the validity of the entire conviction was the same as the contentions raised here, namely, that the precipitous rush to trial after an indictment that was unreasonably delayed deprived him of representation by counsel with adequate time to prepare to competently defend him, and that the delay in obtaining an indictment itself was a denial

[1] A secondary position that if his conviction should be affirmed, the District Court exceeded its jurisdiction in effectively disbarring him from practice in state courts by imposing, as a condition to suspension of a prison sentence, a requirement that petitioner should surrender his license to practice law in all courts, was sustained by the Court of Appeals (*infra*, p. 21).

of due process so as to require dismissal of the indictment.

With preparation time for defense of a criminal case having to be used to examine extensive documentary evidence and refresh the memory of witnesses and to thereby derive a theory of the case to be followed in examination of witnesses and in all trial tactics, the following summary will emphasize disparities between the actual conduct of trial counsel retained by petitioner and the conduct which likely would have been followed had counsel had adequate time to prepare himself to competently defend the petitioner. The following summary emphasizes evidentiary factors which trial counsel with adequate preparation time should have been able to recognize and pounce upon, in a case based upon uncorroborated testimony of an accomplice.[2]

1. Although it was learned at the first meeting of creditors that the bankrupt had a substantial rather than a nominal equity in his real property and that he was without a wife a few months before he filed his bankruptcy petition, so that the vesting of title by the entireties necessarily followed his acquisition of ownership some years earlier, and although the Bankruptcy Judge declared the transfer to have been criminal in setting it aside, more than 26 months lapsed between the first meeting and the indictment, and more than

[2]With the caution with which the trier of fact must weigh an accusing accomplice's uncorroborated testimony, evidentiary considerations include (a) evidence that the accuser originated a fraudulent scheme related to the same subject and (b) inconsistency of circumstantial evidence with the accused's guilt.

23 months lapsed between the judgment setting aside the conveyance and the indictment. The lengthy delay rendered cross-examination of the bankrupt on petitioner's trial much more difficult, particularly in view of the bankrupt's varying claims as to when he first consulted the Petitioner, ranging from before his marriage to his present wife early in November, 1973 until after Christmas, 1973.

2. With the commission of a criminal offense having been proclaimed by the Bankruptcy Judge in the bankruptcy proceedings following the filing of the bankruptcy petition in February, 1974, and with the F.B.I. having interviewed the bankrupt, Mr. Patten, in the summer of 1975, the F.B.I. did not interview Petitioner until November, 1975 [CA App. 237].[3] The bankrupt having charged Petitioner with having devised this scheme of bankruptcy fraud, the F.B.I. necessarily had focused upon Petitioner as the one to be accused before conducting its interview with him, yet it did not advise him that he was the suspect [CA App. 331]. With adequate preparation time to learn the times of these interviews and to study the full background of the case, defense counsel should have been able to recognize such facts as the basis for motion to suppress evidence by which the F.B.I. obtained from Petitioner a verbal summary of facts shown in his files [CA App. 331], but no such motion was filed.

3. The fact of the bankrupt's single status during the summer months of 1973 was brought out in the first

[3]This abbreviation has reference to the Appendix filed in the Court of Appeals.

meeting of creditors by the Trustee's endeavor to learn why there was no wife present to prevent a burglary. At this hearing, the bankrupt for the first time claimed that his secured creditors holding personalty liens actually had no security because everything in his home, down to his shoes and underwear, had been stolen from his home while he was hospitalized that summer, even though he had a German police dog. With his new wife testifying on his trial that his house was fully furnished upon their marriage in early November, 1973, with his limited earnings of less than $70 a week rendering it virtually impossible for him to acquire such new furnishings with cash and with his failure to claim the existence of any new secured creditors for new furnishings, such combination of facts, if defense counsel had had adequate time to prepare and ponder the case, should have led to extensive cross-examination, as well as to pre-trial investigatory activity, aimed at questioning whether this supposed burglary had actually occurred. But no such cross-examination was conducted and the record contains no evidence of such pre-trial investigation.[4]

4. Had astute defense counsel had time to carefully ponder the facts and the probable thinking of the bankrupt after he had been able to obtain transcripts of the Bankruptcy Court proceedings and after he had been able to interview the bankrupt, he should have realized that, if the petitioner either forgot the facts of the

[4]Evidence that the bankrupt pre-fabricated this account as a part of his own personal scheme to defraud creditors would have had the capacity of weakening credibility in the judgment of any impartial trier of facts.

prior conveyance of his client's home or intentionally designed the conveyance in contemplation of bankruptcy, the Petitioner caused the loss of the bankrupt's home so that the bankrupt should have had a resulting powerful, personal animosity against the Petitioner, as well as the powerful motivation of an accomplice to shift the blame for the bankruptcy fraud to his lawyer. No cross-examination occurred on such motivations of the bankrupt, as factors affecting his credibility.

5. The bankrupt brought to Petitioner, for the institution of bankruptcy, a list of his creditors on a sheet of stationery bearing the printed heading "from the desk of Andrew Benedict" (Exh. B). The record does not even identify Andrew Benedict and no questions were directed to the bankrupt as to the identity of Andrew Benedict or how the bankrupt or his wife could have come into possession of a sheet of the said Benedict's stationery. Adequate preparation time should have led defense counsel to both investigate and cross-examine on the identity of Andrew Benedict and on how the bankrupt obtained this stationery. If Andrew Benedict was long-time president of a large national bank located in Nashville, it is not improbable that interviews with Mr. Benedict might have led to invaluable information, such as the date that this particular brand of memo pad was printed and there should certainly have been extensive inquiry as to how either the bankrupt or his wife could have obtained this stationery. No such examination was conducted.

6. Adequate time, after having learned those facts that could be determined by the investigative activities heretofore mentioned, to ponder the consistency of Petitioner's actions with the hypothesis of his guilt should have led to extensive examination and cross-examination upon the inconsistency of his actions with guilt. Such areas of indicated examination include:

(i) Careful advance planning of bankruptcy fraud for which petitioner was receiving a $250 attorney fee should have implanted in Petitioner's mind the importance of his personally carrying through with the fraud to assure its concealment from the Bankruptcy Court; yet he did not even attend the first meeting of creditors, but sent a junior associate in the law practice without in any way cautioning him as to the peculiarities of the case.

(ii) So little impressed was the junior associate with the importance of developments at the hearing and perhaps even with the substantive content of bankruptcy law, that he did not even report back to the petitioner the revelation at the first meeting of creditors that the bankrupt had a substantial equity in the property and that the tenancy by the entireties was not created until within a year prior to adjudication of bankruptcy.

No such cross-examination was conducted on these points.

7. The existence of a conspiracy to conceal assets by creation of an unmarketable tenancy by the entire-

ties should have led, if counsel had had adequate time to prepare, to careful cross-examination on the inconsistency of the *bankrupt's* actions with a plan to alter real property title so that the Bankruptcy Court would not sell the property. Such cross-examination should emphasize two facts:

(i) The inconsistency of delaying from November, 1973, to February, 1974, in creating the tenancy by the entirety when the bankrupt's natural desire should have been to create such tenancy immediately and then let as much time as possible pass before signing a bankruptcy petition; and

(ii) the bankrupt's understanding that title alteration would protect his property was inconsistent with the bankrupt's statement to Petitioner's secretary, which she noted upon her list of information taken from the bankrupt for inclusion on his bankruptcy petition, that he did not want to list his home on the bankruptcy petition (CA App., p. 173).

Such extensive cross-examination did not occur.

8. Defendant, required to appear for arraignment only four days after service of summons and two days after he received notice of the date of arraignment, appeared without counsel and asked for 30 days to retain counsel and have pre-arraignment motions prepared but the Court allowed him only 2 days (Transcript, pp. 3-4). Upon arraignment 2 days later, when counsel was allowed only 7 days to prepare pre-trial motions and approximately 5 additional weeks to pre-

pare for trial Counsel should have sought additional time for both these purposes if the time allowed him before arraignment had been adequate for him to have the bankruptcy record transcribed and to adequately prepare for arraignment, but no such request for additional time was made (Transcript, pp. 3-7).

9. Adequate preparation time to systematically ponder the probable thinking both of the petitioner and the bankrupt would have led the Petitioner's attorney to reject the Court's offer, upon adjudication of guilt, to enter a notice of appeal for Petitioner (CA App., pp. 285-286, 13). Such an insistence upon the advantage of the maximum time for filing notice of appeal would have permitted appellate counsel to suggest the filing of a motion for a written findings of fact and conclusions of law. Although the commission of bankruptcy fraud by *someone* was indicated by documentation, there was no corroboration of the bankrupt's testimony that the conveyance was suggested by Petitioner for bankruptcy purposes. The absence of such findings and conclusions precluded appellate counsel from forming any opinion as to whether the District Judge systematically based his conclusions upon findings in a careful weighing of factors he would have instructed a jury to weigh or whether he subconsciously arrived at the conclusion of guilt from the fact that the Petitioner departed from the standards of extreme caution in handling bankruptcies.[5] By permitting such

[5]The District Judge felt every lawyer should follow extreme caution in giving advice and taking action with reference to the National Bankrupty Act. This judicial attitude was revealed by judicial comments at the hearing upon preliminary motions that

(Footnote continued on following page)

precipitous entry of a notice of appeal, which should have been recognized as dangerous if defense counsel had had adequate preparation time, all possibilities of discovering and placing in the record the actual thinking by which the District Court arrived at its conclusion of guilt was rendered impossible, to the petitioner's prejudice.

Finally, in relation to the shortness of time allowed for trial preparation, it must be conceded that, with trial counsel's apparent failure to realize that he needed more time, the record herein does not show trial counsel's other trial commitments, except that it shows that the District Court made no inquiry whatever as to intervening trial commitments or as to the adequacy of time allowed, but only as to counsel's availability on the date of trial set at the arraignment. However, appellate counsel did request the learned Court of Appeals to take notice from the record before it in another case, *United States* v. *Swonger, et al.*[6] that the same defense counsel was obligated to begin defense of that

(Footnote continued from preceding page)

"filing petitions in bankruptcy are the most dangerous thing a lawyer does . . .", that the District Judge as a lawyer had once almost committed a bankruptcy offense inadvertently (CA App., p. 29), and the Court emphasized further the obligation of a lawyer to be extremely careful almost to the point of fearfulness in acting in bankruptcy matters. In denying petitioner's application for a stay of the state disbarment probation condition pending appeal, the District Court repeatedly emphasized that Petitioner should have learned his lesson to be careful in relation to bankruptcy matters (*infra*, p. 25). The Government has previously unsuccessfully endeavored on two separate occasions to imprison Petitioner for failure to conform to the District Court's standard in regard to handling bankruptcy cases.

[6]Petition for *certiorari* on that case, *Swonger, et al.* v. *United States*, will also be before this Court simultaneously with this petition.

complex criminal case on the day after he was involved in pre-trial motions in this case. It is unknown whether the Court of Appeals agreed or refused to take judicial notice of the facts before it in the *Swonger* case, because the learned Court of Appeals, in its opinion, did not discuss either of these important questions raised before it upon appeal and raised by this petition for *certiorari.*

REASONS FOR GRANTING THE WRIT

The writ should issue because the decision of the Court of Appeals, which took no note of the questions herein raised, is in conflict with the factors enunciated by this Court in *Barker* v. *Wingo,* 407 U. S. 514, for judging the reasonableness of government-caused post-indictment delay in prosecution, to the extent that such considerations are applicable to lengthy pre-indictment delay condemned as a possible violation of the Due Process Clause of the Fifth Amendment in *United States* v. *Marion,* 404 U. S. 307; because this case raises an important issue in the administration of federal criminal law which has not been, but should be settled by this Court, the extent to which the factors enunciated in *Barker* for considering post-indictment delay apply to pre-indictment delay condemned in *Marion;* and because the action of the trial court in rushing the defendant to arraignment and then to trial without adequate time for his counsel to prepare raises serious questions regarding such use of the Speedy Trial Act as to prevent counsel from adequately preparing to competently represent a defendant.

Of the four balancing factors held in *Barker* to be material in judging reasonableness of pre-indictment delay—length of delay, and reason therefor, the defendant's assertion of his rights, and prejudice to the defendant—it would appear that the defendant's assertion of his rights would have little application to pre-indictment delay under the *Marion* principle, for a defendant can seldom be expected to insist upon his own indictment. However, even that consideration, and the others discussed by the court in *Barker,* need elaboration for the guidance of the federal and state judiciary.

Some factors make this case a perfect one for consideration of such issues not heretofore determined.

First, the length of the delay is unreasonable in view of the fact that knowledge that the fraud had been committed was developed in a bankruptcy proceeding under a statute which required immediate investigation and prompt indictment if probable cause for suspecting guilt should develop, 18 U.S.C. § 3057.

Two factors affect the reasonableness of the delay and the correctness of the District Court's ruling thereon, in the absence of the enunciation of any ruling by the Court of Appeals. The first of these is that though innocently, the Court was misled as to the promptness of governmental investigation and the reasons for prior delay. Counsel for the government announced in the course of the hearing upon the pre-indictment delay motion in regard to the requirements of 18 U.S.C. § 3057 as to prompt reporting of suspected fraud by Bankruptcy Court officials and as to prompt

investigation and indictment by Justice Department officials, that the Trustee in Bankruptcy first orally reported the event to the U. S. Attorney's office in October, 1974 (CA App., p. 27), thirteen months before Petitioner was interviewed. In fact, as hereinbefore shown, the F.B.I. had already been investigating the case by interviewing the bankrupt in the summer of 1974, and as the Trustee subsequently testified, he did not report the case to the U. S. Attorney but was invited to the office of the U. S. Attorney for an interview (CA App., pp. 180-182). Hence the record is totally silent as to how the investigation began and as to the reasons for delays either in the investigation or in the subsequent presentation to the grand jury.

Additionally, the case presents the aspect of the Petitioner having been misled and lulled into a sense of security by the F.B.I.'s action in not giving him any warning though he had already become the prime suspect. With the F.B.I.'s well-founded reputation of always warning suspects of their rights before interviewing them, such omission is necessarily viewed by a suspect who is a lawyer as a representation that he is not the object of the investigation, which in this case was a false implied representation. Had the F.B.I. candidly and truthfully revealed to the Petitioner in November, 1975, when it interviewed him, that he was the suspect, he could and presumably would have utilized the intervening seven months before indictment to retain counsel and to carefully prepare by making factual investigations.

Such lulling effect of an innocuous instead of an accusatory F.B.I. interview would tend to cause a de-

fendant to dismiss the matter from his mind instead of racking his brain, searching his records and causing investigations to be made, both to refresh his own memory and to uncover defensive evidence.

This case further presents another aspect of the prejudicial effect of delay—the clouding and confusion of the memory of the bankrupt which rendered cross-examination exceedingly difficult and filled the record with his own conflicting accounts of when events had occurred. Cross-examination would have been much more effective if defense counsel could have asked him about occurrences last winter intead of occurrences three years earlier.

It is further submitted that the use of the Speedy Trial Act to rush the petitioner to arraignment and trial commends this case for grant of *certiorari* because of need for consideration of the use of the Speedy Trial Act to deprive a criminal defendant of effective representation by counsel given adequate time to prepare.

It cannot be assumed that a defendant who is and has for 40 years been a practicing lawyer would choose an incompetent lawyer to defend him upon a serious federal criminal charge. It can only be assumed that counsel he chose was professionally competent though admittedly not knowledgeable in regard to bankruptcy. The effect of limitation upon preparation time is demonstrated by the summary of prior counsel's oversight in the defense of the case. The availability of the procedure of 18 U.S.C. § 3161(h)(8) for excluding from the close time limits of the Speedy Trial Act periods of delay sought by a defendant should have

resulted in Petitioner being given more than two days to select counsel when he asked for 30 days and when the government had dragged its investigation over a period of years for totally unexplained reasons.

Just as loss of memory seldom appears from a trial record "because what has been forgotten can rarely be shown . . .", *Barker, supra* (407 U. S. at 532), so defense counsel's need for more time to investigate and prepare an apparently simple case for trial cannot be brought home to the mind of defense counsel until, by doing some investigation and pondering the results, he gains sufficient insight to comprehend the additional investigation necessary to prepare for competent defense.

The Speedy Trial Act, despite the motivation behind it and its reflection of some of the wisdom in this Court's past decisions, nevertheless has the potential of becoming a tool to be used in the most perfunctory way to deny defendants adequate time for preparation of their defenses. This is an area in which this case rather graphically demonstrates that the deprivation of adequate preparation time can be achieved without defense counsel even realizing that there are large additional areas of investigation that should be pursued in preparation for trial. It is an appropriate vehicle for exploration of the care which should be followed in the overly-hasty setting of cases for trial, long before expiration of the deadline fixed by the Speedy Trial Act, in order that the courts may be consciously aware of the dangers inherent in this beneficial statute when exercising their discretion as to the amount of preparation time that should be given defendants.

The shock of indictment is bound to have a psychological tendency to cause a professional defendant to put the unpleasant threat out of his conscious mind as most defendants are prone emotionally to assume that an indictment will go away if there are interminable delays in bringing it to trial. A defendant, and particularly a professional defendant, needs a recovery period before forcing himself to concentrate on an incident that happened long ago. The picture of statutorily-compelled haste which results in government being allowed years to investigate a simple incident that can be totally investigated in a few months' time, followed by a limitation upon a defendant of less than two months to refresh his memory, to discover leads for further investigation, and to adequately prepare for trial is a picture of a gross degree of favoritism for government fraught with hazards for the defendant who insists upon his innocence. This petitioner continues to insist upon his innocence.

It is therefore respectfully prayed that the writ of *certiorari* issue and that this aged defendant be given one additional chance to clear his name as he has successfully cleared it against past government attacks.

Respectfully submitted,

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APPENDICES

APPENDIX A

No. 76-2680

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

ROBERT H. POLK, - - - - *Defendant-Appellant.*

ORDER—Decided and Filed May 26, 1977

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

On receipt and consideration of an appeal of appellant Polk's conviction for bankruptcy fraud, in violation of 18 U.S.C. §§ 152 and 2 (1970); and

Noting that the primary thrust of appellant's case is that the District Judge erred in his judgment of guilty entered in this nonjury trial because there was insufficient evidence to support the finding of fraud; and

Noting that appellant Polk, an attorney, and his office staff presented evidence which, if believed, would have been of an exonerating nature, but that his client's contrary version of the events was before the District Judge and was strongly supported by the documentary evidence filed in the Bankruptcy Court, both because of the content and the timing of the documents, and that these proofs, if believed by the Judge, clearly serve to allow for a finding of guilty beyond reasonable doubt,

Now, therefore, the judgment of conviction is affirmed, no other material issue pertaining to conviction being presented; and

Further noting that appellant also contends that the District Judge exceeded his legal authority and abused his discretion by imposing as a condition of suspending a two-year prison term and placing appellant on probation that appellant should surrender his license to practice law; and

Further being of the opinion that the District Judge's authority in the premises does not govern the State's licensing of its legal practitioners but is solely concerned with appellant's conduct during the term of the sentence involved,

Now, therefore, the terms of probation imposed by this sentence are vacated and the case is remanded to the District Court for such imposition of limitations, if any, as the court may wish to administer, limited to the extent of the probation term.

Entered by order of the Court
/s/ John P. Hehman
Clerk

APPENDIX B

No. 76-2680

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

ROBERT H. POLK, - - - - *Defendant-Appellant.*

ORDER—Filed August 1, 1977

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substances in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered by order of the Court
/s/ John P. Hehman
Clerk

APPENDIX C

No. 76-2680

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

ROBERT H. POLK, - - - - *Defendant-Appellant.*

ORDER STAYING MANDATE—Filed August 11, 1977

Before: WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered by order of the Court
/s/ John P. Hehman
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA
v.
ROBERT H. POLK
} No. 76-116-NA-CR

MEMORANDUM—Received for entry 8:45 A.M. September 29, 1976

The defendant Robert H. Polk was found guilty of violating 18 U.S.C. §§152 and 2, and the following judgment was entered on September 14, 1976:

> ". . . The defendant is hereby committed to the custody of the Attorney General . . . for imprisonment for a period of two (2) years and fined the sum of $5,000.00. The execution of the sentence as to imprisonment only is suspended and the defendant placed on probation for a period of five (5) years on the following terms and conditions: that he pay the fine provided for in this judgment and surrender his license to practice law in all courts within the next ninety (90) days."

On September 22, 1976, the defendant filed a Motion to Stay Fine and Probation Pending Appeal, asking that this court enter a stay of execution of those provisions of the

sentence requiring the payment of the fine and the surrender of the defendant's license to practice law in all courts.

As to the stay of the requirement that the defendant surrender his license to practice law within ninety days after September 14, 1976, this court is confronted with the following facts:

The evidence of the defendant's guilt in this case was overwhelming. The court saw the witnesses, judged their credibility and was left with no choice but to find the defendant guilty.

After the trial and after a decision that the defendant was guilty, the court reviewed the presentence report which revealed that on August 14, 1945, the defendant was convicted in United States District Court in Nashville, Tennessee, on four counts of violation of the Servicemen's Dependents Allowance Act of 1942. This involved the unlawful receipt of money paid to dependents of servicemen in four separate instances. He was found guilty by a jury on November 28, 1945, fined $2,000.00 and sentenced to the custody of the Attorney General for a period of one year and one day. Thereafter, the original judgment was modified and the $2,000.00 fine removed, and the imprisonment reduced to six months. At that time, the defendant agreed to surrender his license to practice law in all federal courts and agreed to be permanently disbarred from further practice in federal courts. However, thereafter on motion of the defendant, the suspension order was amended by substituting the words, "United States District Court for the Middle District of Tennessee" thereby allowing defendant to resume the practice of law in all districts except the Middle District of Tennessee.

On July 31, 1961, as the result of a petition for reinstatement, the defendant was reinstated as a member of the federal bar.

Thus, it appears that the defendant should have in 1945 learned his lesson.

Based on the conviction before this court and his prior conviction, this court felt obligated and still feels obligated to impose the condition that his license to practice law in all courts be surrendered within ninety days after September 14, 1976.

Although not taken into consideration by the court in sentencing or imposing the conditions of probation, it may be of interest to the Court of Appeals that despite his conviction in 1945 as previously set forth, the defendant has had an unusual record involving allegations which should have alerted him to be careful of his professional conduct. For instance, on July 19, 1953, the defendant was found guilty in the United States District Court in Nashville, Tennessee, of contempt of court by reason of certain activities dealing with alleged advice given to clients which was asserted to constitute practicing in the bankruptcy court. He was convicted by the District Court, but the conviction was set aside by the Court of Appeals, and an order of discharge was entered on February 28, 1956. Thus, he was exonerated, but certainly it was a matter which should have alerted the defendant that he should exercise extreme caution in his practice of law.

Again, on July 24, 1953, the defendant was tried for causing a person to make a false oath in relation to a bankruptcy proceeding—two counts. A verdict of guilty was returned on both counts by the jury. A new trial was granted on January 28, 1954. On May 3, 1954, the indictment was dismissed on a motion filed by the United States Attorney. Once again, the defendant was exonerated. However, once again, the defendant should have been alerted to the pitfalls of practicing law.

On January 28, 1954, the defendant was charged with causing a person to make a false oath in relation to a bank-

ruptcy proceeding—two counts. This apparently was the same charge noted above. He pled not guilty and was acquitted following a jury trial on May 7, 1954. Again, he was found innocent. However, once again, his attention was called to the fact that there were pitfalls in the practice of law and he should have been alerted to them.

Based on the above, the court declines to stay the five-year period of probation and requires the defendant to surrender his license to practice law in all courts within ninety days after September 14, 1976.

With respect to defendant's request for a stay of execution of the fine imposed, it is the determination of this court that said request should be denied. Pursuant to Rule 38, Federal Rules of Criminal Procedure, the defendant, pending appeal, shall deposit in the Registry of the Court, the $5,000.00 fine, the probation report reflecting that the defendant has on deposit in bank accounts or savings and loan accounts very substantial sums of money.

An appropriate order will be entered.

/s/ L. Clare Morton
United States District Judge

APPENDIX E

TITLE 18, UNITED STATES CODE

§ 3057. Bankruptcy investigations

(a) Any referee, receiver, or trustee having reasonable grounds for believing that any violations of the bankruptcy laws or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the referee, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction. As amended May 24, 1949, c. 139, § 48, 63 Stat. 96.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practical time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within

thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an indivdual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained

by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the

granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section

3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

Added Pub.L. 93—619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2076.